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NO. 33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

T. V. WILLIAMS, as State Revenue Commissioner,
Petitioner,

vs.

STOCKHAM VALVES & FITTINGS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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NO.....

IN THE

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OCTOBER TERM, 1957

T. V. WILLIAMS, as State Revenue Commissioner,
Petitioner,

vs.

STOCKHAM VALVES & FITTINGS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

T. V. WILLIAMS, as State Revenue Commissioner of the State of Georgia, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered in the case of STOCKHAM VALVES AND FITTINGS, INC., vs. T. V. WILLIAMS, as State Revenue Commissioner, on November 8, 1957.

OPINIONS BELOW

The judgment of the Superior Court of Fulton County, Georgia is appended hereto (App. A, *infra*, 24.) The opinion and judgment of the Supreme Court of Georgia are as yet unreported but are appended hereto (App. A, *infra*, 26).

JURISDICTION

The judgment of the Supreme Court of Georgia was dated and entered on November 8, 1957. A rehearing in said judgment was denied by the Supreme Court of Georgia on November 26, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3) since the validity of state statutes on grounds of repugnancy to the Constitution of the United States is drawn in question.

QUESTIONS PRESENTED

The questions presented are whether the Georgia statutes which impose a tax, without discrimination, directly upon net income (not a franchise, occupation, privilege or license tax measured by net income), fairly apportioned according to a taxpayer's activities within Georgia, violate either the commerce clause (Article I, Section 8, Clause 3) or the due process clause (Fourteenth Amendment) of the Constitution of the United States, as applied to a foreign corporation which maintained permanently within Georgia a sales service office and sales service employees and which engaged regularly and competitively within Georgia in a variety of sales service activities when all of its sales were consummated at its home office outside Georgia and all of its activities within Georgia were in connection with such sales?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 8, Clause 3 of Article I of the Constitution of the United States provides:

"The Congress shall have power . . . to regulate commerce . . . among the several states . . ."

Section 1 of Amendment XIV of the Constitution of the United States provides:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Section 92-3102 of the Code of Georgia of 1933[1] provides:

"Rate of taxation of corporations.—Every domestic corporation and every foreign corporation shall pay annually an income tax equivalent to five and one-half per cent. of the net income from property owned or from business done in Georgia, as defined in Section 92-3113."

Section 92-3113 of the Code of Georgia of 1933[2] provides:

"The tax imposed by this law shall apply to the entire net income, as herein defined, received by every corporation, foreign or domestic, owning property or doing business in this State. *Every such corporation shall be deemed to be doing business within this State if it engages with this State in any activities or transactions for the purpose of*

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[1] Codifying Section 4 of the Income Tax Act of 1931 (Ga. Laws 1931, Ex. Sess., 24, 26), as amended and in effect for the taxable years 1952, 1954 and 1955, except that the rate was reduced to four percent for taxable years beginning on or after January 1, 1955.

[2] Codifying Section 15 of the Income Tax Act of 1931 (Ga. Laws 1931, Ex. Sess., 24, 26) as amended and in effect for the taxable years 1952, 1954 and 1955. Italicized portion was added by 1950 amendment (Ga. Laws 1950, 299, 300-303). For full text including further provisions for allocating and apportioning net income from business done partly within and partly without the State, see Appendix B, infra, 39-43.

financial profit or gain, whether or not such corporation qualifies to do business in this State, and whether or not it maintains an office or place of doing business within this State, and whether or not any such activity or transaction is connected with interstate or foreign commerce . . ."

STATEMENT OF CASE

For the taxable years 1952, 1954 and 1955, the Petitioner, as State Revenue Commissioner of the State of Georgia, assessed and collected as Georgia income taxes, pursuant to the aforesaid Sections 92-3102 and 92-3113, $18.73, $489.48 and $970.10 respectively, from the Respondent. In due time the Respondent filed claims for refund of the aforesaid taxes and these claims were in due course denied by the Petitioner.

Thereafter, in due time, the Respondent filed a suit against the Petitioner to recover the aforesaid taxes. In its petition the Respondent neither disputed the computation of these taxes nor the reasonableness of the apportionment of its net income to Georgia under the statutory apportionment formula prescribed by the further paragraphs of Section 92-3113. It based its right to recover squarely upon the unconstitutionality of Section 92-3102 and 92-3113 under the commerce clause (Article I, Section 8, Clause 3) and the due process clause (Fourteenth Amendment) of the Constitution of the United States as applied to its activity within the State of Georgia, which it characterized as being entirely in interstate commerce and entirely beyond the territorial limits of the State of Georgia. (R. 26-29). These were the only questions of law raised by Respondent's petition.

The case was tried on an agreed stipulation of facts which is lengthy and which is contained in the record before this Court (R. 2-13). Briefly the facts are as follows:

During the tax years in question, Respondent was a Delaware corporation with its principal office and manufacturing plant at Birmingham, Alabama. It was engaged in the business of manufacturing and selling valves and pipe fittings and in promoting the sale of these products. Purchasers of its products were established local wholesalers and jobbers located in all of the United States. It maintained inventories of its products in established warehouses at Birmingham, Alabama, Philadelphia, Pennsylvania, Chicago, Illinois, Houston, Texas and Vernon, California. It maintained established sales service offices at the above locations and also at Cambridge, Massachusetts, New York, New York, Pittsburgh, Pennsylvania, San Francisco, California, Washington, D. C., Dallas, Texas, St. Louis, Missouri, and Atlanta, Georgia.

The details of Respondent's method of operation using these established sales service offices, and, particularly its sales service activities through its Atlanta office and Atlanta representative, in summary, show that Respondent's activity in and through its Atlanta office and its Atlanta representative was no casual, transitory, spasmodic, travelling-drummer type of activity — they show that Respondent permanently, regularly, and competitively engaged in soliciting business and in many additional activities and services within Georgia, the total purpose and effect of which was to establish, identify, and operate its Atlanta office and its Atlanta representative as local in the same sense

as its competitors who sold comparable products from local inventories in Georgia.

The trial court below found that Respondent, "during the tax years in question, engaged in substantial activities within the State of Georgia for financial profit or gain within the meaning of Code Section 92-3113 . . . that the taxes collected by Defendant from Plaintiff under Code Section 92-3102, being taxes on Plaintiff's net income fairly apportioned according to its activities within the State of Georgia, did not constitute a burden on interstate commerce nor were they levied or collected in violation of Due Process under the Federal Constitution as alleged by Plaintiff's petition." (R. 14, 15; App. A., *infra*, 24-25).

In its bill of exceptions to the Supreme Court of Georgia, Respondent, in its assignment of error (R. 15-16) reiterated its contention that "the collection of said tax, and the portion of the Georgia Income Tax Statute under which said tax was collected, to wit; the first paragraph of Section 92-3113 of the Georgia Code of 1933, as applied to Plaintiff in Error, under the undisputed facts . . . constitutes a burden on and interference with interstate commerce . . ." and "constitutes the taxation of a foreign corporation measured by transactions conducted and concluded entirely without the territorial limits of the State of Georgia and with respect to which no taxable event occurred in the State of Georgia, which is in violation of the due process clause of the United States Constitution . . .". No other questions of law were assigned by Respondent as error in its bill of exceptions.

The question on appeal to the Supreme Court of

Georgia, as stated by the Court in its majority opinion, was as follows: "The plaintiff contends that all of its activities within the State of Georgia are a part of and inseparable from interstate commerce, and that any income tax assessed against the plaintiff is a direct burden on such commerce and violates the commerce clause of the Federal Constitution . . .; that the fact that the plaintiff maintains one sales service office in Georgia and one of its sales representatives spends one-third of his time in Georgia does not make plaintiff present in the State in any substantial sense, and an attempt to subject it to an income tax violates the due process clause of the Federal Constitution . . . No question is raised by the plaintiff as to the reasonableness of the apportionment of its net income to Georgia under the prescribed statutory apportionment formula or to the amount of taxes, if liable, but the plaintiff contends that the State of Georgia is without jurisdiction to impose a net income tax upon a foreign corporation engaged within Georgia in exclusively interstate commerce." (R. 37, 38; App. A., *infra*, 27-28).

In the headnote of its decision of November 8, 1957, (R. 36; App. A., *infra*. 26-27), the Supreme Court of Georgia (one dissent), ruling upon the aforesaid assignment of error, said: "The Georgia Income Tax Statute (Code, Ann., Supp., Section 92-3113), as applied to the Plaintiff [describing Respondent's activities within the State of Georgia], violates both the commerce and due process clauses of the Federal Constitution." Section 6-1606 of the Code of Georgia requires that the Court's decision be announced by a written synopsis of the points decided, and such synopsis, or headnote, is the only conclusion to which the entire Court is committed and which is at last the authori-

tative expression of the Court as such, *Forrester* v. *Forrester*, 155 Ga. 722, 727.

With respect to the commerce clause issue, the majority opinion appears to hold that any form of state or local taxation, other than property taxation, upon a taxpayer engaged exclusively in interstate commerce is a burden on interstate commerce citing (R. 42-44; App. A., *infra*, 33-35) *LeLoup* v. *Port of Mobile*, 127 U. S. 640, 648 (1888); *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203 (1925); *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951); *Atlantic Lumber Co.* v. *Massachusetts*, 298 U. S. 553 (1936); and a note to Mr. Justice Reed's dissenting opinion in *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, 677 (1949) and necessarily equating a tax directly upon fairly apportioned income derived exclusively from interstate commerce with a franchise or privilege tax on exclusively interstate commerce measured by fairly apportioned net income.

With respect to the federal due process issue, the majority opinion (R. 45; App. A., *infra*, 35) says: "We are also of the opinion that the income-tax statute here under consideration, as applied to the Plaintiff, violates the due-process clause of the Federal Constitution," and likens the facts of the case to those in *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340 (1954).

The majority opinion, in conclusion, (R. 46; App. A, *infra*, 37) says: "We hold, therefore, that as applied to the plaintiff, the Georgia Income Tax Act violates both the commerce and due-process clauses of the Federal Constitution and the trial court erred in rendering judgment against the plaintiff."

Without a doubt, the Supreme Court of Georgia has applied the commerce clause (Article I, Section 8, Clause 3) and the due process clause (Fourteenth Amendment) of the Constitution of the United States to invalidate the Georgia income tax statutes as applied to the Respondent; thus has been raised and decided a substantial federal question.

SUMMARY OF REASONS FOR ALLOWANCE OF WRIT

1. The decision of the Supreme Court of Georgia is contrary to the decisions of this Court in *U. S. Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321 (1918) and *West Publishing Co.* v. *McColgan*, 328 U. S. 823 (1946).

2. The decision of the Supreme Court of Georgia misapplies the decision of this Court in *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951).

3. The decision of the Supreme Court of Georgia is in conflict with decisions of the supreme courts of at least six other states on these questions and produces a lack of uniformity in the application of the Constitution of the United States amongst the several states.

4. The decision of the Supreme Court of Georgia, as regards the interstate commerce issue, is contrary to a basic principle of both federal and state income taxation, established by the decision of this Court in *Graves* v. *New York*, 306 U. S. 466 (1939), that a tax on net income is not a direct tax on the source of that income.

5. The decision of the Supreme Court of Georgia, as regards the due process issue, is contrary to the deci-

sions of this Court in *General Trading Co.* v. *State Tax Commissioner*, 322 U. S. 335 (1944) and *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), and misapplies the decision of this Court in *Miller Bros. Co.* v. *Maryland*, 347 U. S. 340 (1954).

6. The identical issues involved in the case at bar are involved in a case now before this Court on appeal, namely, *Northwestern States Portland Cement Co.* v. *Minnesota*, Docket No. 606.

7. Twenty-two states of the United States impose direct income taxes as a substantial source of state revenue. The issues involved in the case at bar are not peculiar to Georgia but are of grave concern to all such states.

ARGUMENT OF REASONS FOR ALLOWANCE OF WRIT

1.

The decision of the Supreme Court of Georgia is contrary to the decision of this Court in U. S. Glue v. Town of Oak Creek, 247 U. S. 321 (1918), and West Publishing Co. v. McColgan, 328 U. S. 823 (1946), affirming the decision of the Supreme Court of California, 27 Calif. 2d 705, 166 Pac. 2d 861 (1946).

Whatever question remained after *U. S. Glue*, stemming from the facts that the taxpayer was a domestic corporation and was engaged in considerable local activity, was thoroughly dispelled in *West Publishing* where the taxpayer was a foreign corporation and was engaged within the taxing state in exclusively interstate activity. *U. S. Glue* involved only the interstate commerce question; *West Publishing* used the due pro-

cess principle of *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945) and the interstate commerce principle of *U. S. Glue*, to establish conclusively the net income tax as a constitutional channel whereby interstate commerce can be required to pay a fair share of the state and local tax burden. The amendment of 1950 to Code Section 92-3113 (Ga. Laws 1950, 299) was predicated upon the *West Publishing* decision. The effort of the Supreme Court of Georgia to distinguish these important cases should not be permitted on the basis merely of general statements made in *Freeman* v. *Hewitt*, 329 U. S. 249, 255 (1946), *Alpha Portland Cement Co.* v. *Massachusetts*, 268, U. S. 203, 218 (1925), and *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 609 (1951), all pertaining to a type of tax which was clearly distinguished by this Court in *U. S. Glue* and by the Supreme Court of California in *West Publishing* and affirmed by this Court.

2.

The decision of the Supreme Court of Georgia misapplies the decision of this Court in Spector Motor Service v. O'Connor, 340 U. S. 602 (1951).

The *Spector* decision invalidated a state tax upon the privilege of carrying on a business that was exclusively interstate commerce notwithstanding it was fairly apportioned to business done within the taxing state. The Connecticut tax in that case was a franchise or privilege tax measured by net income.

The Georgia tax, under Section 92-3102 supplemented by Section 92-3113, is a tax directly on net income derived from activities within Georgia; it is an income tax like the Federal income tax. There is in-

volved here no trace of camouflage, subterfuge or indirection by mere labels. By its language the Georgia tax applies equally to domestic and foreign corporations; it is not an occupation or franchise tax and does not purport to tax net income derived from property owned or business done outside of Georgia. *Interstate Bond Co.* v. *State Revenue Comm.*, 50 Ga. App. 744, 751 (1934).

Concurrently with this tax, Georgia imposes, under Section 92-2401 (App. B., *infra*, 43), a franchise tax on domestic corporations, and, under Section 92-2403 (App. B., *infra*, 44) a franchise tax on foreign corporations for the privilege of doing business in Georgia. This latter franchise tax, as early as 1923, was declared unconstitutional by the Supreme Court of Georgia as applied to a foreign corporation engaged within Georgia in exclusively interstate commerce. *Dennison Mfg. Co.* v. *Wright*, 156 Ga. 789.

The income tax under Section 92-3102 is not complementary to the franchise taxes under Sections 92-2401 and 92-2403; it is in addition to these franchise taxes. The taxes involved in this action were imposed as income taxes under Section 92-3102 and not as franchise taxes under Section 92-2403. Thus we say that the Georgia tax is a direct net income tax, meaning that it is not by indirection a franchise, occupation, privilege or license tax measured by net income, or intended to complement a franchise, occupation, privilege or license tax otherwise inapplicable to taxpayers engaged exclusively in interstate commerce.

The Supreme Court of Georgia has interpreted the decision of this Court in *Spector* as making the fact of

the exclusively interstate character of the taxpayer's activity the *ratio decidendi* of that decision rather than the conjunction of that fact with the fact that the tax involved was a tax on the privilege of doing business within the taxing state.

Certainly since *Fargo* v. *Michigan*, 121 U. S. 230 (1887) and *Philadelphia & Southern Mail S. Co.* v. *Pennsylvania*, 122 U. S. 326 (1887), a license, occupation, franchise or privilege tax measured by gross receipts from interstate commerce has been deemed a direct tax on interstate commerce. In 1938, in *Western Live Stock* v. *Bureau*, 303 U. S. 250, out of an expressed concern that interstate commerce pay its share of the state and local tax burden, this Court appeared to relax the prohibition against direct taxes on interstate commerce to allow such a tax if it could not be repeated in other states and thereby subject that commerce to multiple burdens. Subsequent decisions of this Court in *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), and *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649 (1942) seemed to advance this idea. In *Adams* the opinion used the word "apportionment" as indicating the factor that saved the tax in *Western Live Stock*. After the foregoing decisions it was generally thought that "apportionment" was the cure-all for direct taxes on interstate commerce. This assumption was erroneous, and it is the real substance of the holding in *Spector* that a direct tax on interstate commerce (i. e. a license, occupation, franchise, or privilege tax) cannot be saved by a constructive localization effected by means of even a fair apportionment.

The tax involved in *Memphis Natural Gas* was a

franchise or privilege tax on doing business measured by net income; the dictum of Chief Justice Stone in that case to the effect that even if taxpayer's business were wholly interstate commerce a non-discriminatory tax upon the net income of a foreign corporation derived from within the state is not prohibited by the commerce clause, and citing *U. S. Glue*, was a premature conclusion expressing the development described above. Naturally, this Court in the now-famous footnote 6 of *Spector* had to disavow this dictum, but the disavowal must of necessity be limited to the tax involved in *Memphis Natural Gas* which was, as stated, a franchise or privilege tax measured by net income. It certainly should not be interpreted as superseding the rule of *U. S. Glue* as perfected by *West Publishing*, and we do not believe this Court intended this dictum to have this effect.

3.

The decision of the Supreme Court of Georgia is in conflict with decisions of the supreme courts of at least six other states on these questions and produces a lack of uniformity in the application of the Constitution of the United States amongst the several states.

Before *Spector*, the Supreme Court of New Mexico, in *Humble Pipe Line Co.* v. *New Mexico*, 45 N. Mex. 29, 109 Pac. 2d 247 (1941), followed *U. S. Glue* and rejected *Alpha Portland Cement*, saying, ". . . there is a difference between franchise taxes levied upon corporations because of their activities in interstate commerce and an income tax upon the net income." Likewise, the Supreme Court of Mississippi, in *State Tax Comm.* v. *Memphis Natural Gas Co.*, 197 Miss. 583, 19 Sou. 2d 477 (1944), followed *U. S. Glue*, and this Court

dismissed the taxpayer's appeal for want of a substantial federal question (323 U. S. 682). Reference has already been made to the decision of the Supreme Court of California in *West Publishing Co.* v. *McColgan*, 27 Calif. 2d 705, 166 Pac. 2d 861 (1946), affirmed by this Court (328 U. S. 823), citing *U. S. Glue*.

After *Spector*, the Supreme Court of Oklahoma, in *Southwestern Gas & Elec. Co.* v. *Oklahoma*, 208 Okla. 85, 253 Pac. 2d 549 (1953), following *U. S. Glue* and *West Publishing*, said, "... cases involving a license tax are not comparable to those of the instant case ... the United States Supreme Court distinguishes 'between a tax which is levied for the privilege of engaging in interstate commerce and a tax which is levied upon the net income from such commerce' and holds that net income tax does not conflict with the commerce clause of the Constitution of the United States."

In 1956, the Supreme Court of Louisiana, in *Fontenot* v. *John I. Hay Co.*, 228 La. 1031, 84 Sou. 2d 810, gave special attention to *Spector* in comparison with *U. S. Glue* and *West Publishing* and upheld the tax saying, "the incidence of the present tax is income earned in Louisiana, not the right to transport goods on waters located in Louisiana." And in 1957, the Supreme Court of Minnesota in *Minnesota* v. *Northwestern States Portland Cement Co.*, ... Minn., ... 84 N. W. 2d 373, likewise gave special attention to *Spector* and *Alpha Portland Cement*, in comparison with *West Publishing*, and upheld the tax.

Thus, in New Mexico, Mississippi, California, Oklahoma, Louisiana and Minnesota neither the commerce clause nor the due process clause of the Constitution of

the United States is applied to prohibit a direct income tax (not a license, occupation, franchise or privilege tax) on a foreign corporation doing exclusively interstate commerce. The decision of the Supreme Court of Georgia in this case makes the application of the Constitution of the United States in these respects different from its application in these other states, a situation which this Court ought to rectify and clarify in the interest of uniformity in the application of the Constitution amongst the several states.

4.

The decision of the Supreme Court of Georgia, as regards the interstate commerce issue, is contrary to a basic principle of both federal and state income taxation established by the decision of this Court in Graves v. New York, 306 U. S. 466 (1939), that a tax on net income is not a direct tax on the source of that income.

The relationship between a tax on net income and the source of that income is a very basic problem in the law of income taxation, both federal and state, and is particularly pertinent whenever a source of income is afforded constitutional protection. As this Court said in *Spector*, the "operating incidence" of the tax is "all-important" and "even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so." Quite obviously, the direct income tax imposed by Georgia violates the commerce clause *only* if a tax on income is a tax on the source of that income.

This Court in *Graves* said: "The theory, which once

won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable." This conclusion required the overruling of *Collector* v. *Day*, 11 Wall. 113 (1871), and gave final effect to a development which began with *Peck & Co.* v. *Lowe*, 247 U. S. 165 (1918), and was followed in *U. S. Glue*; *Shaffer* v. *Carter*, 252 U. S. 37 (1920); *Atlantic Coast Line R. Co.* v. *Daughton*, 262 U. S. 413 (1923) and *People, ex rel. Cohn* v. *Graves*, 300 U. S. 308 (1937). Subsequently it has been restated in *Wisconsin* v. *Minnesota M. & M. Co.*, 311 U. S. 452 (1940); *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940); *International Harvester Co.* v. *Wisconsin*, 322 U. S. 435 (1944) and *West Publishing Co.* v. *McColgan*, 328 U. S. 823 (1946).

That a tax on net income is not a tax on the source of that income is a proposition that is a part of the warp and woof of both state and federal income taxation and is by no means limited to the context of interstate commerce. The decision of the Supreme Court of Georgia cannot be permitted to undo the judicial travail this Court has experienced in establishing this basic proposition.

5.

The decision of the Supreme Court of Georgia, as regards the due process issue, is contrary to the decisions of this Court in General Trading Co. v. State Tax Commissioner, 322 U.S. 335 (1944), and International Shoe Co. v. Washington, 326 U. S. 310 (1945), and misapplies the decision of this Court in Miller Bros. Co. v. Maryland, 347 U. S. 340 (1954).

The problem here is the *quality* of the required

"minimum connection between a state, and the person, property, or transaction" of the taxpayer.[3] The Supreme Court of Georgia by its reference to its decision (R. 46; App. A, *infra*, 36-37) in *Redwine* v. *Dan River Mills*, 207 Ga. 381, and *Suttles* v. *Owens-Illinois Glass Co.*, 206 Ga. 849, apparently takes this "minimum connection" to require at least some transactions within the taxing state, such as the contractual consummation of a sale or the actual delivery of goods from inventory, and to ignore other activity, no matter how substantial, which does not culminate within the taxing state in some such transactions. The amendment of 1950 to Section 92-3113 purposely used the term "activities or transactions" in its definition of "doing business" to expand it beyond transactions alone and to exhaust the State's constitutional power to tax on the basis of activities within the State as well as transactions. The effect of the decision of the Supreme Court of Georgia is to say that the due process clause of the Fourteenth Amendment precludes activities other than those culminating in some transaction within the state, from giving jurisdiction to tax and to ignore such activities in deciding whether the state has given any protection, opportunities and benefits for which it can reasonably demand a tax.

Such a concept of the constitutional scope of "doing business" is too narrow. Modern business being what it is, there are many important business activities which involve no contractual transactions and which make substantial contributions to the production of income; many illustrations come to mind: A research

[3] Language of this Court in *Miller Bros.* (p. 345) and quoted by the Supreme Court of Georgia in its opinion in this case (R. 46; App. A, *infra*, 36).

project, an advertising department, a consumer research division, a dealer training program, etc. Any one of these could be carried on within this State with no more than an office and one or a few employees and be a substantial factor in the production of a foreign corporation's income.

This Court has adopted the broader view of the matter. It is significant to note that in *West Publishing* this Court cited *International Shoe* which in turn cited *General Trading Co.*, which in turn cited *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 (1939) and *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, (1941); a review of these cases will show that solicitation and other sales service activities, *conducted on a permanent, regular and competitive basis*, are enough to satisfy due process irrespective of contractual transactions within the taxing state.

The system of established sales service offices and representatives employed by the Respondent in this case was no casual, spasmodic, transitory factor in Respondent's business; it was its permanent, regular and competitive way of doing business generally and within Georgia. Indeed, Respondent's activities within Georgia were very much like the taxpayer's activities in *Northwestern Consolidated Milling Co.* v. *Massachusetts*, 246 U. S. 147, 155 (1918), where a Minnesota corporation, which operated flour mills in Minnesota and sold to wholesale dealers throughout the country, had an office in Massachusetts where it employed several salesmen for the purpose of inducing local tradesmen to carry and deal in its flour, taking orders from them and turning the orders over to the nearest wholesaler for shipment. This Court held that the taxpayer

was doing business in, and subject to tax by, Massachusetts consistently with due process.

In *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940), this Court said "the test is . . . whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state." In *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169 (1949), this Court further said "those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the state." Permanent, regular and competitive activity within a state establishes the *quality* of the required minimum contacts and a fair apportionment formula reflects the *quantity* of such contacts.

In this day when both state and local governments expend considerable sums of money for industrial development and for services which industry demands, it is reasonable, indeed, that foreign corporations who establish themselves on a permanent and competitive basis within a state be required to contribute to the expenses of those governments on some fair basis. We think the above-cited decisions of this Court have so held, and that the decision of the Supreme Court of Georgia, with its narrower view, is contrary to such holdings.

6.

The case of Northwestern States Portland Cement Co. v. Minnesota,—Minn.—, 84 N. W. 2d 373, recently decided by the Supreme Court of Minnesota and docketed in this Court as No. 606 on appeal, involves the same issues as the case at bar.

In that case the taxpayer was a foreign corporation engaged within Minnesota in exclusively interstate commerce. The tax was a direct income tax (not a franchise or privilege tax measured by net income). Its activities were strikingly the same in Minnesota as the Respondent's in Georgia; there are only two[4] differences: (1) the taxpayer there employed five sales representatives, as compared to one in the case at bar, and (2) the flow of taxpayer's products into Minnesota constituted 48% of its sales volume, as compared to 1-2% in the case at bar. As stated, we believe it is the *quality* of a foreign corporation's contacts within a taxing state that is important under the decisions of this Court and not the *quantity*, since the quantity of its contacts are adequately taken into account by a fair apportionment formula under *Mississippi Valley Barge Line Co.*, 336 U. S. 169 (1949).

With *Northwestern States Portland Cement Co.* before this Court on appeal, involving the same issues, we ask this Court to grant certiorari in the case at bar and, at least, permit this Petitioner to have the benefit of this Court's disposition of that case.

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[4] There is another difference in that the Minnesota net income tax is a so-called "second structure" tax, meaning that it complements a franchise tax measured by net income in situations where the taxpayer cannot be subjected to the franchise tax. The Georgia income tax is not a "second structure" tax and if this factor is dispositive of the case from Minnesota, then the case at bar is yet a different case concerning the validity of a direct net income tax on exclusively interstate income.

7.

The relationship between the commerce clause and the due process clause of the Fourteenth Amendment and state taxes imposed directly on net income fairly apportioned according to activity within the taxing state are questions of great concern to states which employ direct income taxes as a source of revenue, and, more so, since the decision of this Court in Spector.

Twenty-one states[5] rely upon the net income tax as a method of raising revenue. For forty years, since 1918, the decision of this Court in *U. S. Glue*, supplemented in 1946 by *West Publishing*, has stood in answer to any question about the relationship of an income tax to interstate commerce. Likewise, for thirty-eight years, since 1920, it has been thought that the decision of this Court in *Shaffer* v. *Carter*, 252 U. S. 37, and other well-known decisions on apportionment, such as *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, decided later in the same year, and *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, decided in 1931, have stood in answer to any question about the relationship of an income tax on multi-state income and due process. These states have relied on these decisions.

The dictum of this Court in *Spector* has been seized upon by taxpayers to relitigate these issues and has been used to introduce an element of uncertainty which we respectfully ask this Court to dispel.

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[5] Alabama, Arizona, Arkansas, California, Colorado, Georgia, Iowa, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, Virginia and Wisconsin.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

JUDGMENTS AND OPINIONS BELOW

1. Judgment of the Superior Court of Fulton County.

NO. A-55986

In the Superior Court of Fulton County, Georgia

STOCKHAM VALVES & FITTINGS, INC.,
Plaintiff

vs.

T. V. WILLIAMS, as State Revenue Commissioner,
Defendant

This case came on for trial at the July Term, 1957, of this Court. Counsel John Izard, Jr. and W. K. Meadow appeared for plaintiff, and Assistant Attorneys General William L. Norton, Jr., and Ben F. Johnson, Jr., appeared for defendant. A stipulation was filed in which it was agreed that this Court should pass on all issues of law and fact without the intervention of a jury and that the facts set forth therein should be received by the Court as all the evidence in the case. After consideration of the facts as stipulated and after hearing oral argument of Counsel for both parties,

IT IS HEREBY FOUND, ORDERED AND ADJUDGED that plaintiff, during the tax years in question, engaged in substantial activities within the State of Georgia for financial profit or gain within the meaning of Code Section 92-3113, as amended by an Act approved February 16, 1950 (Ga. Laws 1950, pp. 299-303); that the taxes collected by defendant from plain-

tiff under Code Section 92-3102, being taxes on plaintiff's net income fairly apportioned according to its activities within the State of Georgia, did not constitute a burden on interstate commerce nor were they levied or collected in violation of Due Process under the Federal Constitution, as alleged by plaintiff's petition; that the aforesaid Code Section 92-3113, as specified by plaintiff's petition, is not unconstitutional for any of the reasons assigned in plaintiff's petition; that said taxes were not erroneously or illegally collected by defendant from plaintiff; that plaintiff is not entitled to any recovery against defendant; that judgment be for defendant; and that the costs of the action be cast against plaintiff.

In open Court this 19 day of July, 1957.

/s/ CLAUDE D. SHAW
Judge, Fulton Superior Court

2. Opinion and Judgment of the Supreme Court of Georgia.

Supreme Court of Georgia.

Case No. 19838.

STOCKHAM VALVES & FITTINGS, INC.,

vs.

WILLIAMS, State Revenue Commissioner.
Decided November 8, 1957.

By the Court:

The Georgia Income Tax Statute (Code, Ann. Supp. § 92-3113) as applied to the plaintiff, a non-resident corporation with its home office and manufacturing plant outside of the State of Georgia — which maintained only a sales-service office in this state, which was used as headquarters by one of its sales representatives, who spent about one-third of his time in that office or traveling within this State, and in which office a small amount of office furniture, valued at approximately $1,000, was maintained, and one woman secretary was employed, and where the sales representative carried on the ordinary duties of a salesman in Georgia calling on customers and prospective customers, but no orders were accepted within the State of Georgia, and all sales were made on an "f.o.b. warehouse" basis and were completed at warehouses outside of the state by deliveries to customers or to common carriers consigned to customers — violates both the commerce and due-process clauses of the Federal Constitution (Code §§ 1-125 (3), 1-815), and the

trial court erred in sustaining its validity as against such attacks.

This was an action brought by Stockham Valves & Fittings, Inc. (hereinafter referred to as the plaintiff), against T. V. Williams as Revenue Commissioner of the State of Georgia, to recover income taxes paid by the plaintiff under protest to the state for the calendar years 1952, 1954, and 1955, assessed against the plaintiff under the following Georgia Income Tax Statutes: Code (Ann. Supp.) § 92-3102, which provides that "Every domestic corporation and every foreign corporation shall pay annually an income tax equivalent to four percent of the net income from property owned or from business done in Georgia, as defined in section 92-3113"; and Code (Ann. Supp.) § 92-3113, which provides that "The tax imposed by this law shall apply to the entire net income, as herein defined, received by every corporation, foreign or domestic, owning property or doing business in this State. Every such corporation shall be deemed to be doing business within this State if it engages within this State in any activities or transactions for the purpose of financial profit or gain, whether or not such corporation qualifies to do business in this State, and whether or not it maintains an office or place of doing business within this State, and whether or not any such activity or transaction is connected with interstate or foreign commerce." Claims for a refund of the taxes paid having been denied by the defendant, the present suit was brought.

The plaintiff contends that all of its activities within the State of Georgia are a part of and inseparable from interstate commerce, and that any income tax assessed

against the plaintiff is a direct burden on such commerce and violates the commerce clause of the Federal Constitution (Code § 1-125 (3)); that the fact that the plaintiff maintains one sales-service office in Georgia and one of its sales representatives spends one-third of his time in Georgia does not make the plaintiff present in the State in any substantial sense, and an attempt to subject it to an income tax violates the due-process clause of the Federal Constitution (Code § 1-815). No question is raised by the plaintiff as to the reasonableness of the apportionment of its net income to Georgia under the prescribed statutory apportionment formula or to the amount of taxes, if liable; but the plaintiff contends that the state is without jurisdiction to impose a net income tax upon a foreign corporation engaged within Georgia in exclusively interstate commerce.

The facts were stipulated, and the issue was submitted to the trial judge without a jury; and to the judgment upholding the validity of the statute and the tax the plaintiff excepts.

From the stipulation of facts it appears that the plaintiff is a corporation organized under the laws of Delaware with its principal or home office and its manufacturing plant located in Birmingham, Alabama. Since 1905, and including the tax years in question, it has been engaged in the business of manufacturing and selling valves and pipe fittings and in promoting the sale and use of valves and pipe fittings which it manufactured. For the tax years in question, it maintained inventories of its products in established warehouses at Birmingham, Ala., Philadelphia, Pa., Chicago, Ill., Houston, Tex., and Vernon, Calif. It maintained estab-

lished sales-service offices at the foregoing locations and also at Cambridge, Mass., New York, N. Y., Atlanta, Ga., Pittsburgh, Pa., San Francisco, Calif., Washington, D. C., Dallas, Tex., and St. Louis, Mo. Purchasers of plaintiff's valves and pipe fittings were located in all the United States.

As a matter of policy and practice, during the tax years in question, the plaintiff made sales only to established local wholesalers and jobbers and (except for sales to makers of automatic-sprinkler systems) made no sales directly to users and installers of valves and pipe fittings. The local wholesalers and jobbers who handled the plaintiff's products, however, were in no way tied in or committed by any type of license, franchise, or other authorized or exclusive dealership arrangements to the distribution of the plaintiff's products. Any established local wholesaler or jobber, having established credit, was considered as a prospective customer and could buy from the plaintiff. Established local wholesalers and jobbers who did buy from the plaintiff were entirely free to discontinue buying from it at any time and for any reason; they were also free to deal in competitive products and usually did handle one or more lines of competing products.

The plaintiff, during the years in question, made no sales on a consignment basis and maintained no inventories of its own at any place except at the aforesaid warehouses, none of which were located in Georgia. Through its sales representative, it encouraged every local wholesaler and jobber who handled its products to carry a local inventory, and to those local wholesalers and jobbers who did maintain a local inventory of valves, it gave a price concession, which was not avail-

able to wholesalers and jobbers who did not. Pipe fittings were, however, sold at uniform prices whether or not carried in inventory.

All orders for the plaintiff's products were contractually accepted or rejected at the home office of the plaintiff in Birmingham, Alabama. No representative of the company at any sales-service office had any authority to, or did, contractually accept or reject any order under any circumstances. Contractural authority was vested exclusively in the home office in Birmingham, Alabama. For the most part, orders were received by mail at the company's home office in Birmingham directly from wholesalers and jobbers. Such orders as were received at sales-service offices, or by the solicitation of sales representatives working out of sales-service offices, were relayed by mail, telephone or teletype to the home office at Birmingham for contractual acceptance or rejection. Some such orders were rejected by the home office for credit or other reasons.

The plaintiff had no plant or warehouse in Georgia. All sales were made on an "f.o.b. warehouse" basis, and were completed at the plant or warehouse by deliveries to customers or to common carriers consigned to customers.

Since 1950, and during the tax years in question, the plaintiff maintained a sales-service office in Atlanta. One of its sales representatives used this office as his headquarters. He worked in a territory which included Georgia, North Carolina, South Carolina, and parts of Tennessee and Virginia. Part of Florida was also included in his territory until 1954. This representative spent approximately one-third of his time at the At-

lanta sales office or traveling in the State of Georgia. The other two-thirds of his time was spent traveling outside of Georgia. He was paid a salary plus a commission on the amount of business derived from the territory served by the Atlanta office.

The plaintiff also employed at its sales-service office in Atlanta a full-time woman secretary. She functioned on the basis of her own knowledge and experience and literature furnished by the company as a source of information concerning the plaintiff's products. She performed stenographic and clerical duties and facilitated communications between the plaintiff's home office in Birmingham, the plaintiff's sales representative when he was out in the territory, and customers, prospective customers, contractors, and users of the plaintiff's products. She operated the teletype machine and sometimes obtained information from Birmingham to give to architects, engineers, or other people interested in the plaintiff's products.

The Atlanta sales-service office was listed in the Atlanta telephone directories in the plaintiff's name in both the alphabetical and classified business listings. The office was listed in the plaintiff's name in the Atlanta city directories. The company, on its sales-service office letterheads, in its catalogues and discount sheets, and on some promotional material, listed the fact that it maintained a sales-service office in Atlanta. A small amount of office furniture was maintained there of the approximate value of $1,000. The representative carried on the ordinary duties of a salesman in Georgia. No orders were, however, accepted within the State of Georgia. All sales were completed at warehouses outside of the State by deliveries to customers

or to common carriers consigned to customers. All such sales took place outside of Georgia.

At no time during the tax years in question did the plaintiff qualify to do business within the State of Georgia; no officers or director of the plaintiff was a resident of Georgia; the Atlanta sales representative was a resident of the State. During the tax years in question, rent, salaries, and all other expenses of the Atlanta office were paid by check drawn by officers located at the home office on bank accounts of the company in banks outside the State of Georgia. No employee of the plaintiff in Georgia had authority, either alone or with any other person, to draw checks upon or make withdrawals from any bank account of the company. Expense accounts of employees at the Atlanta office were forwarded to the home office, where they were reviewed and paid by checks. The plaintiff kept no bank account in the State of Georgia. All credit matters were handled at the plaintiff's Alabama office, where credit information was obtained and all credit questions were passed on. All invoices were prepared and mailed from and all collections were made by the plaintiff's office in Alabama. No employee of the plaintiff in Georgia had authority to accept nor did any employee accept any order, bind plaintiff to furnish goods, arrange credit terms, or make collections.

Hawkins, Justice. (After stating the foregoing facts.) That the decision of the questions here presented is not without difficulty, is pointed out by the Supreme Court of the United States in the recent decision in Freeman v. Hewit, 327 U. S. 249, 252, (67 Sup. Ct. 274, 91 L. ed. 265), where it is said: "The history of this problem is spread over hundreds of volumes of ou

Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts." In LeLoup v. Port of Mobile, 127 U. S. 640, 648 (8 Sup. Ct. 1380, 32 L. ed. 311), the Supreme Court stated the fundamental limitations of the commerce clause on state taxation as follows: "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." In Forrester v. Culpepper, 194 Ga. 744, 748 (22 S. E. 2d 595), this court quoted with approval from Interstate Bond Co. v. State Revenue Com., 50 Ga. App. 744, 751 (179 S. E. 559), the following: "The general view is that an income tax is not a property tax, but more in the nature of an excise tax." In Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 218 (45 Sup. Ct. 477, 69 L. ed. 916, 44 A. L. R. 1219), a Massachusetts excise tax, based on the proportion of a company's assets employed in the state and the proportion of its net income derived in the State, was held unconstitutional as applied to a taxpayer engaged exclusively in interstate commerce. The taxpayer maintained a branch sales office in Massachusetts, which was used as headquarters by its traveling salesmen. It owned office equipment there, and its local manager handled petty cash items for the company through a bank account maintained

in his own name. The court found that all of the taxpayer's activities were an integral part of interstate commerce, and therefore held the excise unconstitutional. The court said: "The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was intended to modify well-established principles. It must be read with the essential facts in mind. Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the state." In Spector Motor Service v. O'Connor, 340 U. S. 602, 609 (71 Sup. Ct. 508, 95 L. ed. 573), it is said: "This court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state."

From the foregoing statement of facts it appears without dispute that the plaintiff was engaged exclusively in interstate commerce insofar as its activities in Georgia are concerned; and in Atlantic Lumber Co. v. Commissioner of Corporations and Taxation of Massachusetts, 298 U. S. 553, 555 (56 Sup. Ct. 887, 80 L. ed. 1328), it was held: "If appellant did nothing but transact interstate business, the tax would constitute a burden upon that commerce, and could not stand under the commerce clause of the Constitution."

Counsel for the defendant contend that a tax on

net income does not stand upon the same basis and is not the equivalent of a license, occupation, franchise, or privilege tax on interstate commerce; but, as previously pointed out, we have held that an income tax is in the nature of an excise tax, and in the footnote added to the dissenting opinion written by Mr. Justice Reed in Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662, 677 (69 Sup. Ct. 1264, 93 L. ed 1613), it is said: "Since we perceive no difference for the purposes of this case between franchise, privilege, and excise taxes, insofar as they are exacted for the privilege of doing or the doing of interstate business, we have treated them as identical as far as their validity under the commerce clause is concerned. In Ozark and Anglo-Chilean Nitrate the taxes were called franchise taxes; In Alpha it was labeled an excise tax." In Dennison Mfg. Co. v. Wright, 156 Ga. 789 (3-b) (120 S. E. 120), this court held: "Where a foreign corporation rents and maintains an office in this State, with a stock of samples and a force of office employees and traveling salesmen, merely to obtain orders in this State and other States, subject to approval by its home office, for its goods to be shipped directly to its customers from its home State, such an arrangement is part of its interstate commerce, and not subject to a local excise tax."

We are also of the opinion that the income-tax statute here under consideration, as applied to the plaintiff, violates the due-process clause of the Federal Constitution. We take it that no one will question the fact that a state may not tax activities carried on outside its borders without violating this provision of the Constitution. The question in every case is whether such a connection exists between a business and the taxing state as to permit the imposition of a general income

tax on a portion of the net income of the business; and in Wisconsin v J. C. Penney Co., 311 U. S. 435, 444 (61 Sup. Ct. 246, 85 L. ed. 267), the Supreme Court said: "That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." See also Miller Brothers Co. v. Maryland, 347 U. S. 340, 344 (74 Sup. Ct. 535, 98 L. ed. 744), where the foregoing rule was applied to facts quite similar to those in the instant case. There the court said: "The question here is whether this vendor, by its acts or course of dealing, has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this collector's liability." After referring to its previous decisions, that court said: "Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law. But the course of decisions does reflect at least consistent adherence to one time-honored concept; that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."

This court, in Redwine v. Dan River Mills, 207 Ga. 381 (61 S. E. 2d 771), held that activities more extensive than those carried on by the plaintiff did not constitute "doing business" within the meaning of the in-

come-tax act then in effect; and in Suttles v. Owens-Illinois Glass Co., 206 Ga. 849 (59 S. E. 2d 392), it was held that accounts growing out of similar activities in Georgia did not have a tax situs in Georgia. See also Norton Co. v. Department of Revenue of Illinois, 340 U. S. 534 (71 Sup. Ct. 377, 95 L. ed. 517).

We hold, therefore, that as applied to the plaintiff the Georgia Income Tax Act violates both the commerce and due-process clauses of the Federal Constitution, and the trial court erred in rendering judgment against the plaintiff. The cases mainly relied upon by the defendant, namely, U. S. Glue Co. v. Town of Oak Creek, 247 U. S. 321 (38 Sup. Ct. 499, 62 L. ed. 1135); Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 (41 Sup. Ct. 45, 65 L. ed. 165); Atlantic Coast Line R. Co. v. Doughton, 262 U. S. 413 (43 Sup. Ct. 620, 67 L. ed. 1051); Memphis Natural Gas Co. v. Beeler, 315 U. S. 649 (62 Sup. Ct. 857, 86 L. ed. 1090); West Publishing Co. v. McColgan, 27 Cal. 2d 705 (166 Pac. 2d 861), and others, are clearly distinguishable on their facts. In those cases the taxpayers were either residents of the taxing State, or were carrying on within the State extensive intrastate as well as interstate business, or else the statements therein made which would seem to conflict with the rulings here made were obiter. In Freeman v. Hewit, 329 U. S. 249, 255 (67 Sup. Ct. 274, 91 L. ed. 265), the Supreme Court of the United States recognized that the taxing power permitted by the U. S. Glue Company case, supra, was applicable only to residents of a State. It was said: "It (a State) can tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce." The Underwood Typewriter decision, supra, was explained and limited in Alpha Port-

land Cement Co. v. Massachusetts, 268 U. S. 203, 218 (45 Sup. Ct. 477, 69 L. ed. 916, 44 A. L. R. 1219), where the court said: "The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was intended to modify well-established principles." The dictum in the Beeler case, supra, was expressly disapproved as such by the Supreme Court in Spector Motor Service v. O'Connor, 340 U. S. 602, 609 (71 Sup. Ct. 508, 95 L. ed. 573), in the following language: "Any suggestion in that opinion as to the possible validity of such a tax if applied to earnings derived wholly from interstate commerce is not essential to the decision in the case."

As already pointed out by the United States Supreme Court, its decisions dealing with the problem here presented are spread through hundreds of volumes of its reports, and all of its pronouncements are not consistent or reconcilable. To attempt to harmonize all that has been said, would neither clarify what has gone before nor guide the future, and to undertake here to point out the distinguishing features of each of the numerous decisions would only consume unnecessary time and space.

Judgment reversed. All the Justices concur except Head, J., who dissents.

APPENDIX B

STATUTORY PROVISIONS

1. **Section 92-3113 of the Code of Georgia of 1933,** the same being also Section 15 of the Income Tax Act of 1931 (Ga. Laws 1931, Ex. Sess., pp. 24, 34-36), as amended (Ga. Laws 1950, pp. 299, 300-303) and in effect during the years involved in this case:

Corporations, allocation and apportionment of income.—The tax imposed by this law shall apply to the entire net income, as herein defined, received by every corporation, foreign or domestic, owning property or doing business in this State. Every such corporation shall be deemed to be doing business within this State if it engages within this State in any activities or transactions for the purpose of financial profit or gain, whether or not such corporation qualifies to do business in this State, and whether or not it maintains an office or place of doing business within this State, and whether or not any such activity or transaction is connected with interstate or foreign commerce.

If the entire business income of the corporation is derived from property owned or business done in this State, the tax shall be imposed on the entire business income, but if the business income of the corporation is derived in part from property owned or business done in the State and in part from property owned or business done without the State, the tax shall be imposed only on that portion of the business income which is reasonably attributable to the property owned and business done within the State, to be determined as follows:

(1) Interest received on bonds held for investment and income received from other intangible property held for investment are not subject to

apportionment. Rentals received from real estate held purely for investment purposes and not used in the operation of the business are also not subject to apportionment. All expenses connected with the interest and rentals realized from such investments are likewise not subject to apportionment but must be applied against the investment income. The net investment income from intangible property shall be allocated to Georgia if the situs of the corporation is in Georgia or the intangible property was acquired as income from property held in Georgia, or as a result of business done in Georgia. The net investment income from tangible property located in Georgia shall be allocated to Georgia.

(2) Gains from the sale of tangible or intangible property not held, owned, or used in connection with the trade or business of the corporation nor for sale in the regular course of business shall be allocated to the State if the property sold is real or tangible personal property situated in the State, or intangible property having an actual situs or a business situs within the State. Otherwise such gains shall be allocated outside the State.

(3) Net income of the above classes having been separately allocated and deducted, the remainder of the net business income shall be apportioned as follows: Where income is derived principally from the holding and/or sale of intangible property, having a taxable situs in this State, the tax should be imposed on the entire business income; if a portion of such intangible property has a taxable situs without the State, the portion of the income derived from the holding and/or sale of such property attributable to this State shall be taken to be such percentage as the gross receipts from such intangible property in this State for the taxable year bear to the total gross receipts from such

sources: Provided, that the taxable situs of intangible property held or owned by any domestic corporation or by any foreign corporation whose principal place of business is in Georgia, shall be deemed to be in the State of Georgia, notwithstanding any domicile of any such corporation established elsewhere.

(4) Where income is derived from the manufacture, production, or sale of tangible personal property, the portion of the net income therefrom attributable to property owned or business done within this State shall be taken to be the portion arrived at by application of the following:

Three Factor Ratio

(a) **Average inventory ratio.**—The ratio of the average of the monthly inventories of all products held in this State for sale, lease or other distribution or use in connection with the trade or business of the taxpayer during the taxable year to the average of the total monthly inventories of all products held everywhere for sale, lease or other distribution in connection with the trade or business of the taxpayer. The term 'products' shall include goods, wares and merchandise of every character and kind, whether owned by the taxpayer or held on consignment or otherwise, but shall not include unrecovered or unextracted natural resources, raw materials, or goods in process of manufacture.

If the taxpayer shall fail to keep its records so as to disclose the information necessary to apply the foregoing ratio, the Commissioner shall determine the same from such information as may be available.

(b) **Salaries and wages ratio.**—The ratio of all

salaries, wages, commissions, and other compensation paid or incurred by the taxpayer in this State for services performed in connection with the trade or business of the taxpayer during the taxable year to the total salaries, wages, commissions, and other compensation paid or incurred by the taxpayer in connection with its entire trade or business, wherever conducted, during the taxable year. For the purposes of this section, all salaries, wages, commissions and other compensation paid to residents of Georgia shall be deemed to have been paid or incurred in this State, irrespective of the place of actual payment.

(c) **Gross receipts ratio.**—The ratio of gross receipts from business done within this State to total gross receipts from business done everywhere. For the purposes of this section receipts shall be deemed to have been derived from business done within this State only if received from products shipped to customers in this State, or delivered within this State to customers, and in determining the gross receipts within Georgia, receipts from sales negotiated or effected through offices of the taxpayer outside the State and delivered from storage in the State to customers outside the State shall be excluded.

(d) The average inventory ratio, the salaries and wages ratio, and the gross receipts ratio shall be separately determined and the three percentages averaged, and the net income of the corporation allocated and apportioned to Georgia according to such average.

(e) For the purposes of this section, the word 'sale' shall include exchange, and the word 'manufacture' shall include the extraction and recovery of natural resources and all processes of fabricating and curing.

(5) Where income is derived from business

other than the manufacture, production or sale of tangible personal property, or from the holding or sale of intangible property, the net income shall be equitably apportioned within and without the State under rules and regulations of the State Revenue Commissioner, in the ratio that the business within the State is to the total business of the corporation.

(6) The net income of a domestic or foreign corporation which is a subsidiary of another corporation or closely affiliated therewith by stock ownership shall be determined by eliminating all payments to the parent corporation or affiliated corporation in excess of fair value, and by including fair compensation to such domestic business corporation for its commodities sold to or services performed for the parent corporation or affiliated corporation. For the purposes of determining such net income the Commissioner may equitably determine such net income by reasonable rules of apportionment of the combined income of the subsidiary, its parent and affiliates or any thereof.

2. **Section 92-2401 of the Code of Georgia of 1933,** the same being also Paragraph 43 of Section 1 of the General Tax Act of 1935 (Ga. Laws 1935, pp. 11, 25), as amended (Ga. Laws 1951, pp. 157, 167; 1952, pp. 371, 372) and in effect during the years involved in this case:

Corporations, domestic and domesticated foreign.—All corporations incorporated under the laws of Georgia, except those that are not organized for pecuniary gain or profit, and domesticated foreign corporations, in addition to all other taxes now required by them by law, are hereby required to pay each year an annual license or occupation tax as specified in the following scale: . . .

3. **Section 92-2403 of the Code of Georgia of 1933,** the same being also Paragraph 44 of Section 1 of the General Tax Act of 1935 (Ga. Laws 1935, pp. 11, 28) and in effect during the years involved in this case:

> **Foreign corporations.**—All corporations incorporated or organized under the laws of any other State, Territory, or Nation, doing business or owning property in this State, except those not operated for pecuniary gain or profit, in addition to all other taxes now required of them by law, are hereby required to pay each year an annual license or occupation tax for the privilege of carrying on their businesses within this State, as specified in the following scale: . . .